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No. 02-1028

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

JAMES N. KIRBY PTY LTD., DBA KIRBY ENGINEERING, AND ALLIANZ AUSTRALIA LIMITED,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS

Public Citizen, Inc. is a public advocacy, lobbying, and litigating organization with approximately 160,000 members nationwide. It has a longstanding interest in limiting the reach of the federal preemption doctrine to situations in which Congress has made clear its intent to oust state law in order to serve important federal objectives. Of particular relevance here, Public Citizen's lawyers have been counsel for parties and amici before this Court in cases that posed the question whether federal law preempts state-law judicial remedies intended to compensate those harmed by tortious conduct. *See, e.g. Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). In each instance, they argued that, under this Court's Supremacy Clause precedents, the requisite Congressional intent to preempt tort remedies was not present.[1]

Although Public Citizen does not have a strong interest in the maritime law issues that form the principal dispute among the parties, it does have a strong interest in, and strenuous objection to, the federal preemption theory advanced at pages 21-26 of the amicus brief filed by the United States. Therefore, this amicus brief is solely addressed to the argument advanced by the United States. As explained below, the government's theory cannot be squared with this Court's precedents, which demand, at the least, that preemption be

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[1]In blanket letters of consent filed with the Clerk, the parties have consented to the filing of amicus briefs in this case. Pursuant to this Court's Rule 37.6, amicus states that this brief was not authored in whole or in part by counsel for a party and that no one other than amicus made a monetary contribution to the preparation or submission of this brief.

based on a clear federal policy expressed by Congress through the text of federal law or by a federal agency acting pursuant to an appropriate Congressional delegation.

INTRODUCTION AND SUMMARY OF ARGUMENT

Public Citizen is concerned about the implications of the Solicitor General's preemption argument in this case because it is based neither on express provisions of federal law nor on the structure of a federal statute meant to govern the conduct of a regulated entity. Rather, the government's argument is based on a supposed federal policy of "non-discrimination" between rates charged to shippers who deliver their own goods and those, like freight forwarders, who carry consolidated shipments belonging to various owners. However, as explained in greater detail below, the government is unable to tether this theory to any federal statute or regulation that seeks to govern the conduct of petitioner Norfolk Southern at issue in this suit. This Court has never countenanced the ouster of state law with so little evidence of Congressional intent to do so, and it should not do so here.

ARGUMENT

THE UNITED STATES' PREEMPTION THEORY SHOULD BE REJECTED AS WHOLLY AT ODDS WITH THE COURT'S SUPREMACY CLAUSE JURISPRUDENCE

1. The federal preemption doctrine has its origin in the Supremacy Clause, Article VI, Clause 2 of the Constitution, which provides the basic authority for the proposition that conflicts between federal and state law must be resolved in favor of federal law. *See McCulloch v. Maryland*, 4 Wheat. 316, 427, 4 L.Ed. 579 (1819); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Preemption is said to be "express"

if a federal statute explicitly addresses the domain of state law that is or is not preempted, and is "implied" if the structure and purpose of federal law, but not its actual words, preempt state law. *Id.*

The Supremacy Clause is restricted by other constitutional principles implicit and explicit in the constitutional plan, most prominently in the Tenth Amendment that provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In light of this constitutional imperative of federalism, a party seeking preemption of state law bears a heavy burden. There is a strong presumption against preemption that may be overcome only by "clear and manifest" congressional intent to the contrary. *See, e.g., Medtronic*, 518 U.S. at 485; *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994); *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605, 611 (1991); *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985).

Thus, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Put differently, "[p]reemption of state law by federal . . . regulation is not favored 'in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.'" *Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)).

The foregoing precepts are not mere precedential idiosyncrasies, but are deeply embedded in the "federal-state balance" that was fundamental to the constitutional plan.

Hillsborough County, 471 U.S. at 717; *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Thus, the Court's Supremacy Clause jurisprudence is "an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). And, it makes perfect sense to implement these principles of federalism through a presumption against preemption, since, under the Supremacy Clause, Congress retains the power to preempt when it so chooses, and it need only speak clearly to manifest its preemptive intent. Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U.L. Rev. 559, 627 (1997); *see also Jones*, 430 U.S. at 525 (presumption against preemption "provides assurance that the 'federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts") (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

2. In light of these basic principles, "there is no federal pre-emption *in vacuo*, without a congressional text or a federal statute to assert it." *Puerto Rico Dept. of Consumer Affairs v. ISLA Petroleum Corp.*, 485 U.S. 495, 503 (1988). Rather, the Court must determine whether a federal statutory scheme manifestly withdraws the remedies that ordinarily would be available to someone who, like respondent Kirby, can show that a railroad bears responsibility for damaging its good in domestic transit. Cases subsequent to this Court's ruling in *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959), involving the construction of Himalaya clauses, assume that if the Himalaya clause does not apply to the plaintiff's claims (*i.e.*, it does not benefit the alleged tortfeasor), the plaintiff can sue in tort for full damages. *See, e.g., Caterpillar Overseas, S.A. v. Marine Transp., Inc.*, 900 F.2d 714, 725-26 (4th Cir. 1990); *De Laval Turbine, Inc. v. West India Indus., Inc.*, 502 F.2d 259, 267 (3d Cir. 1974). Of course, in some instances, the relevant tort would be a *maritime* tort,

but that is not the case here, where the conduct at issue occurred entirely inland, and thus state common law applies. *See, e.g., Coleman Co., Inc. v. Compagnie Generale Maritime*, 903 F. Supp. 45, 48 (S.D. Ga. 1995). In any event, claiming that a tort remedy — state-law-based or otherwise — is overridden by a privately-bargained contract provision is a far cry from claiming that, even if it is not overridden by contract, the tort remedy is eviscerated by external principles of federal law. Indeed, the very fact that none of the many cases examining the breadth of Himalaya clauses address, let alone find persuasive, claims of federal preemption — and the Solicitor General cites none — underscores the unprecedented character of the government's preemption argument.

3. No express preemption provision is involved here, such as those that Congress has enacted specifically to target state law, and the federal statute or a federal agency has set the relevant standard of care governing the defendant's conduct. *See, e.g., Cipollone*, 505 U.S. at 524-30. The government cites no federal statute that eliminates or limits state tort remedies for the owner of goods damaged or destroyed in domestic transit by a domestic rail carrier operating under a private rail contract, as is the case here.

4. State law may be impliedly preempted in two basic ways. First, when Congress occupies a field so pervasively that no room is left for state regulation, state law is impliedly preempted. *Rice*, 331 U.S. at 230. "Comprehensive" federal regulation, however, is not itself sufficient to preempt state law. *Hillsborough County*, 471 U.S. at 718; *Medtronic*, 518 U.S. at 507 (Breyer, J., concurring in part and concurring in the judgment). Rather, the text and structure of the federal legislation must itself clearly evince Congress's intent to occupy the entire field. Thus, for example, even the extensive federal regulation of medical devices, pesticides, or even nuclear safety is not sufficient to impliedly preempt all state

law in those areas. *See Medtronic*, 518 U.S. 470 (medical devices); *Mortier,* 501 U.S. 595 (pesticides); *Silkwood v. Kerr-McGee,* 464 U.S. 238 (1984) (nuclear safety). The United States does not claim field preemption here, nor could it. Congress has given no indication that it intended that the liability regime for losses that occur at sea should apply to a tort arising from the land-based portion of a multimodal shipment.

The instances in which the Court has found field preemption in the maritime area serve to underscore the differences between a Congressional directive that eliminates all forms of state regulation and the situation here. In *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), the Court considered whether various aspects of a Washington state law governing oil tankers in Puget Sound (the "Tanker Law") was preempted by the Ports and Waterways Safety Act of 1972 ("PWSA") and various Coast Guard regulations promulgated thereunder. *Ray* held that specific design requirements imposed by the Tanker Law were preempted by Title II of the PWSA, which occupied the entire field of state law in this area. *Id.* at 168. Because Title II obligated the Coast Guard to promulgate rules regarding all aspects of tanker design and operation, the statute "le[ft] no room for the States to impose different or stricter design requirements than those which Congress has enacted...." *Id.* By contrast, *Ray* held that Title I of the PWSA, which *permitted*, but did not obligate, the Coast Guard to issue various rules to control vessel traffic did not preempt Washington state's tug-escort rules, because the Coast Guard had yet to promulgate conflicting rules on that same topic. *Id.* at 168-72; *see also United States v. Locke*, 529 U.S. 89, 103-113 (2000) (reaffirming both parts of *Ray* analysis). Here, Congress has not directed any federal agency to require any national rules limiting or allocating liability among potentially responsible parties concerning cargo losses incurred during the inland portion of multimodal shipments, and the government

does not contend otherwise. Therefore, there is no implied field preemption.

5. The second category of implied preemption is often referred to as "conflict" preemption. The Court has recognized conflicts where compliance with both federal and state law is physically impossible, *Florida Lime & Avocado Growers*, 373 U.S. at 142-43, and where state law stands as an obstacle to the accomplishment of federal legislative or regulatory objectives. *See, e.g., Hillsborough County*, 471 U.S. at 713; *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). There is, of course, no preemption based on "impossibility" here, because it cannot be claimed that by compensating Kirby in tort, Norfolk Southern would therefore be precluded from taking some action demanded by a competing regulatory or common-law regime (and here there is no such regime).

That leaves the question whether imposing tort liability on Norfolk Southern for its negligence in causing the destruction of Kirby's goods would somehow stand as an obstacle to the attainment of federal objectives. Not surprisingly, in this Court's cases, such objectives are discerned by looking to federal statutes or to regulations issued by a federal agency pursuant to a valid Congressional authorization. *Cipollone*, 505 U.S. at 516; *Hillsborough County*, 471 U.S. at 714-22. And, as noted, even then, "comprehensive" federal regulation alone is not sufficient. *Id.* at 718. Rather, the Court has consistently rejected the eradication of state law on the basis of general federal participation in the regulatory field and has "look[ed] for special features warranting preemption." *Id.* at 719.

Here, such "special features" would require, at the least, some federal statute or regulation evincing a particular concern about the liability regime for inland carriers, such as Norfolk Southern, in multimodal shipping. There is none. *Indeed, there*

is no statute applicable to the inland portion of the transaction, let alone one concerned with the liability rules that would govern the Kirby-Norfolk Southern relationship. As the Solicitor General acknowledges (U.S. Br. 5), the Carriage of Goods by Sea Act ("COGSA"), 46 App. U.S.C. § 1300 *et seq.*, does not apply of its own force, because the loss at issue here occurred inland and not "from the time when the goods [were] loaded on to the time when they [were] discharged from the ship." 46 App. U.S.C. § 1301(e). To be sure, Norfolk Southern maintains that COGSA principles applicable to the Hamburg Sud bill of lading also apply to the relationship between Kirby and Norfolk Southern, a proposition that Kirby, of course, vehemently disputes. But even if that were true, COGSA would apply to Kirby only as a matter of contract and not of its own force. *Cf.* U.S. Br. 5-6 (noting that COGSA does not preclude shipper and carrier from agreeing to liability limits for losses that occur before loading and after discharge from ship); *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 (1995). In sum, the preemption argument advanced by the government appears to be completely theoretical and not tied at all to the "circumstances of [this] particular case." *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000) (quoting *Hines*, 312 U.S. at 67); *cf. Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) ("The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute.").

Without a statutory or regulatory hook for its preemption argument, the government relies on an elaborate description of a policy against charging different rates to "shippers who deliver their own property than to shippers, such as freight forwarders, who consolidate goods belonging to various owners." U.S. Br. 24 (citation omitted). The government maintains that this common-law non-discrimination policy, carried over to maritime commerce in the Shipping Act, would be subverted because "cargo owners who

deal directly with Hamburg Sud would be bound by the liability limit in Hamburg Sud's bill of lading, while cargo owners who ship through an intermediary are not...." U.S. Br. 25. But that theory depends not only on the government's assertion that providing one shipper a higher liability limit than another "would likely" violate the Shipping Act, *id.*, but, more fundamentally, on the notion that this antiquated, anti-competitive "non-discrimination" principle has been carried over to rail carriage. It has not. In fact, the government acknowledges that Congress has effectively *deregulated* rail carriage. *See* U.S. Br. 25 n.9. To say, as does the government, that "the statutory ban on unreasonable discrimination remains in force," *id.* (citing 49 U.S.C. § 10741(a)), is not meaningful, because that provision does not apply when rail carriers privately contract with shippers (as occurred here between Columbus Line USA and Norfolk Southern). *See* 49 U.S.C. §§ 10709, 10741(b)(1); *see* U.S. Cert. Stage Br. 12 ("we are advised by petitioner that the rail transport in this case was provided as contract carriage under 49 U.S.C. 10709, which would make the transport exempt from the Carmack Amendment's liability rules"). For all practical purposes, then, the non-discrimination "policy" as it affects rail carriage only exists for those who choose to be bound by it; in other words, it is no policy at all. There is thus *no* statutory or regulatory basis for the preemption claim here.

6. The government cites only one of this Court's preemption precedents, *Geier*, 529 U.S. 861, an implied protection case that is a world apart from the situation here. In *Geier*, the plaintiff sought damages under state law on the theory that her injuries in a car crash were caused by the defendant auto manufacturer's failure to install an airbag. The Court held that the suit was preempted by a federal regulation, promulgated pursuant to statute, that required cars to have passive restraint devices, but allowed manufacturers to choose among various restraint options including, but not limited to,

airbags. The Court reviewed in great detail the history of the relevant regulation, and concluded that a state-law damages action premised on a manufacturer's duty to have installed an airbag was impliedly preempted by a rule that rejected mandatory airbags in all cars and allowed manufacturers to protect occupants by other means. *Id.* at 874-83. There is nothing remotely similar to that situation here, where no one points to a federal statute or regulation that sets Norfolk Southern's standard of care in the carriage of Kirby's goods, let alone a standard of care that would be in conflict with the tort duty applicable in Kirby's state-law action. Moreover, as noted above, no federal statute addresses the liability rules for the inland rail carriage at issue.

CONCLUSION

For the reasons stated above, the Court should reject the preemption argument advanced by the United States.

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